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STATE CAPITOL
PHOENIX, ARIZONA

October 27, 1971

DEPARTMENT OF LAW LETTER OPINION NO. 71-26-L (R-87)

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REQUESTED BY: CHARLES H. MARTIN
Director
Department of Mental Retardation

QUESTION: Is restrictive zoning by a county on property on which the Department of Mental Retardation intends to construct a center applicable to the Department as a state agency?

ANSWER: No.

A review of the pertinent authority discloses a presumption, absent contrary statutory language, that an agency in a superior position in governmental hierarchy has immunity from zoning restrictions. Aviation Services v. Board of Adjustment, 119 A.2d 761, 20 N.J. 275 (1956). Municipal zoning ordinances are not applicable to the state or its agencies exercising governmental as distinguished from proprietary functions. City of Bloomfield v. Davis, 119 N.W.2d 909 (1963); 101 C.J.S., Zoning, § 135. Local zoning ordinances do not apply to public use of property by an agency of the government having the power to acquire such property by eminent domain. State v. Kopp, 330 S.W.2d 882 (1960).

In Arizona, the Supreme Court has noted that a state agency, allocated by law the responsibility of performing a governmental function, is not subject to the general police power of a municipal corporation. Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960). Zoning finds its authority in the police power, and one municipality in discharging its governmental functions will not be subject to the zoning regulations of a sister municipality. City of Scottsdale v. Municipal Court of the City of Tempe, 90 Ariz. 393, 368 P.2d 637 (1962).

Opinion No. 71-26-L
(R-87)
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Page Two

More specifically, by fact situation, a Tennessee court has held that a county could not enforce zoning ordinances against the state in construction of a mental health building, as the state was immune for governmental purposes if the construction did not result in creating a nuisance. Davidson County v. Harmon, 292 S.W.2d 777 (1956).

It is the opinion of this office that the State Department of Mental Retardation is establishing a mental retardation center as authorized by law, is acting in its governmental capacity for the benefit of the public, and is therefore exempt from county zoning restrictions.

Respectfully submitted,

Gary K. Nelson
G. F. S.

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The Attorney General

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